

ISIDRO OLIVAREZ, PETITIONER, COURT OF APPEALS AND PEOPLE OF THE PHILIPPINES, RESPONDENTS.

G.R. No. 163866. July 29, 2005

Ponente: YNARES-SANTIAGO, J.

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YNARES-SANTIAGO, J.:

For review is the Court of Appeals' decision in CA-G.R. CR No. 22860[1] which affirmed the judgment[2] rendered by the Regional Trial Court of San Pedro, Laguna, Branch 93,[3] in Crim. Case No. 0505-SPL finding petitioner Isidro Olivarez guilty of violating Section 5, Republic Act No. 7610,[4] and its resolution denying reconsideration thereof.[5]

The case originated from a complaint filed by the offended party with the Municipal Trial Court of San Pedro, Laguna which was the basis upon which an information for violation of R.A. 7610 was filed against Isidro Olivarez, to wit:

The undersigned 4[th] Assistant Provincial Prosecution (sic) of Laguna upon a sworn complaint filed by the private complainant, CRISTINA B. ELITIONG, hereby accuses ISIDRO OLIVAREZ of the crime of "VIOLATION OF RA 7610", committed as follows:

That on or about July 20, 1997, in the Municipality of San Pedro, Province of Laguna, within the jurisdiction of this Honorable Court, said accused actuated by lewd design did then and there wilfully, unlawfully and feloniously by means of force and intimidation commit acts of lasciviousness on the person of one CRISTINA B. ELITIONG, by touching her breasts and kissing her lips, against her will, to her damage and prejudice.

CONTRARY TO LAW.[6]

The established facts of this case are as follows:

... The offended party Cristina Elitiong was a 16-year old high school student who with her brothers were employed by the accused, 64-year old Isidro Olivarez, in the making of sampaguita garlands. For one year she had been reporting for work during weekends at the residence of the accused. Within the compound and at about three arm's length from the main door of the house was her workplace.

At about 11:30 o'clock in the morning of July 20, 1997, Cristina, her two brothers Macoy and Dodong, and one named Liezel were at their work when the accused who was near the main door called for her. She dutifully approached him. The accused asked her if she had told her mother that he gave her money, and when she said that she did not, he embraced her and held her breast. The workers were facing the street so that the two were not seen. He pulled her to the kitchen and, closing the kitchen door, kissed her on the lips. She pushed him away and went back to her station. Her brother Macoy saw her crying when she came out of the house. She did not say a word, but went to the faucet and washed her face.

The offended party continued to finish the garlands she was working on, and waited until the afternoon for her wages. When she arrived at her home, she first told her mother that she no longer wished to go back. When pressed for a reason, she said basta po mama ayaw ko ng magtuhog. Finally, she told her mother what happened.

Aurora Elitiong, the mother, accompanied the offended party to the San Vicente Barangay Hall on July 26 to report the incident and give a statement. Days later, Cristina gave another statement to the local police.

In the defense version, the offended party and her brothers had slept overnight in the house of the accused. When Isidro woke up in the early morning to relieve himself, he saw the girl sleeping on the sofa. He admonished her to join her brothers in the basement. He went back to his room and slept until 8 A.M. Two hours later, at 10 A.M., he left for the Caltex Service Station which was only a five minute ride from his home by tricycle. His daughter Analee Olivarez was staying in another house in the compound and attended a morning mass. When she returned at 10:30 A.M., she no longer saw her father. Maritess Buen, the laundrywoman, who was washing clothes outside the kitchen, saw the accused earlier. By 10 A.M., when she entered the house, he already left. He returned by noontime.

The accused testified that he was at the Caltex station for two and a half hours waiting for the shipment of flowers from Pampanga. The goods arrived at 12:15 P.M. He left shortly thereafter and passed by the market before going home. He arrived at 12:30 P.M. The next several days were uneventful for him until his laundrywoman Maritess told him that there was a complaint against him at the barangay office. A meeting took place between him and the girl's family in the presence of the barangay authorities. The girl's mother was demanding P30,000 for the settlement of the case, but he refused to cave in and told a barangay official Jaime Ramos that he would rather see his accusers in court than give a centavo because he did not commit the crime.[7]

The trial court found Olivarez guilty of violating Section 5 of R.A. 7610 and sentenced him to suffer an indeterminate penalty of imprisonment from eight (8) years and one (1) day of prision mayor as minimum to seventeen (17) years, four (4) months and one (1) day of reclusion temporal as maximum, to indemnify the minor Cristina Elitiong in the amount of P15,000.00 as moral damages and to pay the costs.

On appeal, the decision of the trial court[8] was affirmed by the Court of Appeals. The motion for reconsideration[9] filed by the accused was denied.[10] Hence, this petition for review[11] on the following grounds:

- The Honorable Court of Appeals committed grave abuse of discretion in not holding that the essential elements in Violation of Section 5, Article III of Republic Act 7610, which are age of the offended party and that she is an abused or exploited child as defined in the law, not having been alleged in the Information, petitioner/accused cannot be found guilty of said offense and must be acquitted.
- The Honorable Court of Appeals erred and committed grave abuse of discretion in holding that the Information charging petitioner/accused of Violation of Section 5, Republic Act 7610, but failing to allege the essential elements of said offense, had substantially complied with the requirements of due process for the accused.
- The Honorable Court of Appeals erred and gravely abused its discretion in not reversing the judgment of the trial court convicting the accused/petitioner and sentencing him to suffer the penalty of imprisonment for alleged Violation of Section 5, Republic Act 7610, which was not alleged in the Information.[12]

Petitioner alleges that his right to be informed of the nature and cause of the accusation against him was violated for failure to allege in the information the essential elements of the offense for which he is being charged.

Section 5, Article III of R.A. 7610 states:

SEC. 5. Child Prostitution and Other Sexual Abuse. — Children, whether male or female, who for money, profit, or any other consideration or due to the coercion or influence of any adult, syndicate or group, indulge in sexual intercourse or lascivious conduct, are deemed to be children exploited in prostitution and other sexual abuse.

The penalty of reclusion temporal in its medium period to reclusion perpetua shall be imposed upon the following:

...

(b) Those who commit the act of sexual intercourse or lascivious conduct with a child exploited in prostitution or subjected to other sexual abuse: Provided, That when the victim is under twelve (12) years of age, the perpetrators shall be prosecuted under Article 335, paragraph 3, for rape and Article 336 of Act No. 3815, as amended, the Revised Penal Code, for rape or lascivious conduct, as the case may be: Provided, That the penalty for lascivious conduct when the victim is under twelve (12) years of age shall be reclusion temporal in its medium period; ..." (Italics supplied)

The elements of sexual abuse under Section 5, Article III of R.A. 7610 are as follows:

- The accused commits the act of sexual intercourse or lascivious conduct.
- The said act is performed with a child exploited in prostitution or subjected to other sexual abuse.
- The child, whether male or female, is below 18 years of age.[13]

Section 32, Article XIII, of the Implementing Rules and Regulations of R.A. 7610 defines lascivious conduct as follows:

[T]he intentional touching, either directly or through clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks, or the introduction of any object into the genitalia, anus or mouth, of any person, whether of the same or opposite sex, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person, bestiality, masturbation, lascivious exhibition of the genitals or pubic area of a person.[14] (Emphasis supplied)

The first element obtains in this case. It was established beyond reasonable doubt that petitioner kissed Cristina and touched her breasts with lewd designs as inferred from the nature of the acts themselves and the environmental circumstances.[15]

The second element, i.e., that the act is performed with a child exploited in prostitution or subjected to other sexual abuse, is likewise present. As succinctly explained in *People v. Larin*:[16]

A child is deemed exploited in prostitution or subjected to other sexual abuse, when the child indulges in sexual intercourse or lascivious conduct (a) for money, profit, or any other consideration; or (b) under the coercion or influence of any adult, syndicate or group...

It must be noted that the law covers not only a situation in which a child is abused for profit, but also one in which a child, through coercion or intimidation, engages in lascivious conduct. (Emphasis supplied)

We reiterated this ruling in *Amplayo v. People*:[17]

... As we observed in *People v. Larin*, Section 5 of Rep. Act No. 7610 does not merely cover a situation of a child being abused for profit, but also one in which a child engages in any lascivious conduct through coercion or intimidation...

Thus, a child is deemed subjected to other sexual abuse when the child indulges in lascivious conduct under the coercion or influence of any adult. In this case, Cristina was sexually abused because she was coerced or intimidated by petitioner to indulge in a lascivious conduct. Furthermore, it is inconsequential that the sexual abuse occurred only once. As expressly provided in Section 3 (b) of R.A. 7610, the abuse may be habitual or not. It must be observed that Article III of R.A. 7610 is captioned as "Child Prostitution and Other Sexual Abuse" because Congress really intended to cover a situation where the minor may have been coerced or intimidated into

lascivious conduct, not necessarily for money or profit. The law covers not only child prostitution but also other forms of sexual abuse. This is clear from the deliberations of the Senate:

Senator Angara. I refer to line 9, "who for money or profit." I would like to amend this, Mr. President, to cover a situation where the minor may have been coerced or intimidated into this lascivious conduct, not necessarily for money or profit, so that we can cover those situations and not leave loophole in this section.

The proposal I have is something like this: WHO FOR MONEY, PROFIT, OR ANY OTHER CONSIDERATION OR DUE TO THE COERCION OR INFLUENCE OF ANY ADULT, SYNDICATE OR GROUP INDULGE, et cetera.

The President Pro Tempore. I see. That would mean also changing the subtitle of Section 4. Will it no longer be child prostitution?

Senator Angara. No, no. Not necessarily, Mr. President, because we are still talking of the child who is being misused for sexual purposes either for money or for consideration. What I am trying to cover is the other consideration. Because, here, it is limited only to the child being abused or misused for sexual purposes, only for money or profit.

I am contending, Mr. President, that there may be situations where the child may not have been used for profit or ...

The President Pro Tempore. So, it is no longer prostitution. Because the essence of prostitution is profit.

Senator Angara. Well, the Gentleman is right. Maybe the heading ought to be expanded. But, still, the President will agree that that is a form or manner of child abuse.

The President Pro Tempore. What does the Sponsor say? Will the Gentleman kindly restate the amendment?

ANGARA AMENDMENT

Senator Angara. The new section will read something like this, Mr. President: MINORS, WHETHER MALE OR FEMALE, WHO FOR MONEY, PROFIT, OR ANY OTHER CONSIDERATION OR INFLUENCE OF ANY ADULT, SYNDICATE OR GROUP INDULGE IN SEXUAL INTERCOURSE, et cetera.

Senator Lina. It is accepted, Mr. President.

The President Pro Tempore. Is there any objection? [Silence] Hearing none, the amendment is approved.

How about the title, "Child Prostitution," shall we change that too?

Senator Angara. Yes, Mr. President, to cover the expanded scope.

The President Pro Tempore. Is that not what we would call probable "child abuse"?

Senator Angara. Yes, Mr. President.

The President Pro Tempore. Subject to rewording. Is there any objection? [Silence] Hearing none, the amendment is approved. x x x. (Italicization supplied)[18]

Petitioner makes much of the failure to allege in the information that Cristina was a child below 18 years of age at the time the offense was committed. He insists that the Court of Appeals mistakenly relied on the case of *People v. Rosare*[19] because unlike in *Rosare*, he had no personal knowledge of Cristina's age, which he claims was not proven beyond reasonable doubt.

In all criminal prosecutions, the accused is entitled to be informed of the nature and cause of the accusation against him.[20] A complaint is sufficient if it states the name of the accused; the designation of the offense given

by the statute; the acts or omissions complained of as constituting the offense; the name of the offended party; the approximate date of the commission of the offense; and the place where the offense was committed.[21]

The complaint or information shall state the designation of the offense given by the statute, aver the acts or omissions constituting the offense, and specify its qualifying and aggravating circumstances. If there is no designation of the offense, reference shall be made to the section or subsection of the statute punishing it.[22] The acts or omissions complained of as constituting the offense and the qualifying and aggravating circumstances must be stated in ordinary and concise language and not necessarily in the language used in the statute but in terms sufficient to enable a person of common understanding to know what offense is being charged as well as its qualifying and aggravating circumstances and for the court to pronounce judgment.[23]

In the present case, the Court of Appeals found the information to be sufficient. Relying on the principle laid down in *People v. Rosare*, it held:

Before us is an information for violation of RA 7610 that, as in *Rosare*, fails to mention an indispensable element of the offense, the age of the offended party, but makes allusion to another document, the sworn complaint of the offended party, and declares it to be the basis upon which the information was filed. This instrument is the complaint filed by the offended party with the Municipal Trial Court of San Pedro, Laguna in which she stated that she was 16 years old at the time of the offense. It forms part of the initial records of the case and comes before the posting of bail and entry of the plea of not guilty before the RTC. It appears that after the charge was filed with the MTC, and as the preliminary investigation went underway, the accused filed a manifestation stating that he had filed a counter-affidavit to the charge and reserved the right to file a motion to quash the information if it was filed. The MTC found probable cause against him and elevated the records to the provincial prosecutor for filing of the information.

A complaint is under the Rules one of the two charging instruments for the offense of which the accused was tried and convicted here. While the criminal action was instituted by the complaint of the offended party, the information signed only by the fiscal ushered in the formal trial process. But both are accusations in writing against the accused and serve the purpose of enabling him to take the necessary legal steps for his defense. What is important is that the information states that the accused is being charged of an offense under RA 7610 based on the complaint of the offended party, to which the accused had adequately responded. Under these conditions, the accused was fully apprised of the accusation against him. The purpose and objective of the constitutional mandate are discharged and satisfied. The accused may not be said to be taken by surprise by the failure of the information to state the age of the offended party, when he had received the initiatory complaint where he was told how old the offended party was.[24]

We agree with the ruling of the Court of Appeals. In *People v. Rosare*, the information did not allege that the victim was a mental retardate which is an essential element of the crime of statutory rape. This Court however sustained the trial court's judgment of conviction holding that the resolution of the investigating prosecutor which formed the basis of the information, a copy of which is attached thereto, stated that the offended party is suffering from mental retardation. It ruled that there was substantial compliance with the mandate that an accused be informed of the nature of the charge against him. Thus:

Appellant contends that he cannot be convicted of statutory rape because the fact that the victim was a mental retardate was never alleged in the information and, absent this element, the acts charged negate the commission of the offense for which he was convicted by the lower court.

Pursuant to Section 8, Rule 112 of the Rules of Court, we have decided to motu proprio take cognizance of the resolution issued by the investigating prosecutor in I.S. No. 92-0197 dated June 2, 1992, which formed the basis of and a copy of which was attached to the information for rape filed against herein appellant. Therein, it is clearly stated that the offended party is suffering from mental retardation. We hold, therefore, that this

should be deemed a substantial compliance with the constitutional mandate that an accused be informed of the nature of the charge against him. ...[25]

In *People v. Villamor*, [26] the information failed to allege the age of the offended party but since a copy of the order issued by the investigating judge was attached in the record of the preliminary investigation clearly stating that the complainant was nine years old, it was held that there was substantial compliance with the mandate to inform the accused of the nature of the accusation. It was also declared that the defense cannot invoke the element of surprise as to deprive it of the opportunity to suitably prepare for the accused's defense, thus:

... Furthermore, even if the information filed did not allege that the complainant was nine years old, there was substantial compliance with the constitutional mandate that an accused be informed of the nature of the charge against him when the Order issued by the investigating judge, a copy of which was attached in the record of the preliminary investigation, clearly stated that the complainant was nine years old. Consequently, the defense cannot invoke the element of surprise as to deprive it of the opportunity to suitably prepare for the accused's defense. [27]

In *People v. Galido*, [28] the information for rape failed to allege the element of force or intimidation. The Court ruled that this omission is not fatal since the complaint specifically charged the accused with three counts of rape committed by means of force and intimidation. Thus:

Appellant avers that because the Informations on which he was arraigned and convicted did not allege the element of force or intimidation, he was deprived of his constitutional right to be informed of the nature and cause of the accusation against him. He insists that such failure was a fatal defect that rendered the Informations void.

As a rule, the accused cannot be convicted of an offense, unless it is clearly charged in the complaint or information. Otherwise, their constitutional right to be informed of the nature and cause of the accusation against them would be violated.

In the present case, appellant correctly pointed out that the element of "force or intimidation" should have been expressly alleged in the Informations. This omission is not fatal, however, because the Complaint specifically accused him of three counts of rape committed by means of force and intimidation... [29]

The same ground was adopted in *People v. Mendez* [30] which involved an information for rape that failed to allege force or intimidation. We ruled therein that it was not a fatal omission because it was stated in the complaint that accused Rosendo raped Virginita "by means of force."

In *People v. Torellos*, [31] the Court treated the information for rape which failed to allege force and intimidation as merely defective and that the deficiency was cured by the failure of the accused to assail the insufficiency of the allegations in the Information and by competent evidence presented during trial.

Thus, while it is necessary to allege the essential elements of the crime in the information, the failure to do so is not an irremediable vice. When the complaint or the resolution by the public prosecutor which contain the missing averments is attached to the information and form part of the records, the defect in the latter is effectively cured, and the accused cannot successfully invoke the defense that his right to be informed is violated.

In the instant case, the missing averment in the information is supplied by the Complaint which reads in full:

COMPLAINT

The undersigned complainant, accuses ISIDRO OLIVAREZ, of the crime of VIOLATION OF RA 7610, committed as follows:

That on or about 11:30 A.M. of July 20, 1997 at Brgy. San Vicente, San Pedro, Laguna, Philippines and within the jurisdiction of this Honorable Court the said accused with lewd design did then and there willfully, unlawfully and feloniously commit an act of lasciviousness against one CRISTINA ELITIONG Y BALDONO, 16 years old, by kissing and touching her private parts and embracing her against her will.

CONTRARY TO LAW.[32]

Petitioner was furnished a copy of the Complaint which was mentioned in the information, hence he was adequately informed of the age of the complainant. The prosecution has also established the minority of the offended party through competent evidence. Cristina testified that she was 16 years old and a certification from the Office of the Local Registrar of San Pedro, Laguna was presented showing that she was born on October 17, 1980.[33] The third element of sexual abuse is therefore present.

The information merely states that petitioner was being charged for the crime of "violation of R.A. 7610" without citing the specific sections alleged to have been violated by petitioner. Nonetheless, we do not find this omission sufficient to invalidate the information. The character of the crime is not determined by the caption or preamble of the information nor from the specification of the provision of law alleged to have been violated, they may be conclusions of law, but by the recital of the ultimate facts and circumstances in the complaint or information.[34] The sufficiency of an information is not negated by an incomplete or defective designation of the crime in the caption or other parts of the information but by the narration of facts and circumstances which adequately depicts a crime and sufficiently apprise the accused of the nature and cause of the accusation against him.

True, the information herein may not refer to specific section/s of R.A. 7610 alleged to have been violated by the petitioner, but it is all to evident that the body of the information contains an averment of the acts alleged to have been performed by petitioner which unmistakably refers to acts punishable under Section 5 of R.A. 7610. As to which section of R.A. 7610 is being violated by petitioner is inconsequential. What is determinative of the offense is the recital of the ultimate facts and circumstances in the complaint or information.

The prosecution has proved beyond reasonable doubt that petitioner committed acts of sexual abuse against Cristina. The trial court found Cristina's testimony to be clear, candid, and straightforward.[35] Her testimony, given in a categorical, straightforward, spontaneous and candid manner, is worthy of faith and belief.[36] In the face of the accusations against him, petitioner could only interpose uncorroborated alibi and denial. Denial, like alibi, is an inherently weak defense and cannot prevail over the positive and categorical identification provided by eyewitnesses.[37] Not only did Cristina identify the petitioner as her assailant but no ill-motive was adduced why she would impute against him so grave a charge. This Court will not interfere with the trial court's assessment of the credibility of witnesses, absent any indication that some material fact was overlooked or a grave abuse of discretion committed. None of the exceptions obtain in the instant case.[38]

In addition to moral damages, a fine in the amount of P15,000.00 should likewise be imposed pursuant to our ruling in *Amployo v. People*: [39]

It does not end there. In *People v. Abadies*, and with respect specifically to lascivious conduct amounting to child abuse under Section 5(b) of Rep. Act No. 7610, we imposed a fine of P30,000 for each count of lascivious conduct in addition to the award of moral damages on the justification that —

It will be noted that Section 5, Article II of Republic Act No. 7610 provides for the penalty of imprisonment. Nevertheless, Section 31(f), Article XII (Common Penal Provisions) thereof allows the imposition of a fine subject to the discretion of the court, provided that the same is to be administered as a cash fund by the Department of Social Welfare and Development and disbursed for the rehabilitation of each child victim, or any immediate member of his family if the latter is the perpetrator of the offense. This provision is in accord with Article 39 of the Convention on the Rights of the Child, to which the Philippines became a party on

August 21, 1990, which stresses the duty of states parties to ensure the physical and psychological recovery and social reintegration of abused and exploited children in an environment which fosters their self-respect and human dignity.

With the case of Abadies as guidepost, we impose a fine of Fifteen Thousand Pesos (P15,000.00) on petitioner.

WHEREFORE, the petition is DENIED. The decision of the Court of Appeals dated January 9, 2004 in CA-G.R. CR No. 22860 and its resolution dated June 4, 2004, are AFFIRMED with MODIFICATION. In addition to the award of P15,000.00 as moral damages, petitioner Isidro Olivarez is also ordered to pay a fine in the amount of P15,000.00.

SO ORDERED.

Quisumbing, and Azcuna, JJ., concur.

Carpio, J., see dissenting opinion.

Davide, Jr., C.J., join Mr. Justice Carpio in his dissent.

[1] Rollo, pp. 7-16. Penned by Associate Justice Mario L. Guariña III and concurred in by Associate Justices Martin S. Villarama, Jr. and Jose C. Reyes, Jr.

[2] CA Rollo, pp. 12-16.

[3] Penned by Judge Francisco Dizon Paño.

[4] AN ACT PROVIDING FOR STRONGER DETERRENCE AND SPECIAL PROTECTION AGAINST CHILD ABUSE, EXPLOITATION AND DISCRIMINATION, PROVIDING PENALTIES FOR ITS VIOLATION, AND FOR OTHER PURPOSES.

[5] Rollo, p. 18.

[6] Original Records, p. 1.

[7] Rollo, pp. 11-13.

[8] CA Rollo, pp. 12-16.

[9] Id. at 206-213.

[10] Rollo, p. 18.

[11] Id. at 20-34.

[12] Id. at 24.

[13] *Amployo v. People*, G.R. No. 157718, 26 April 2005.

[14] *People v. Bon*, G.R. No. 149199, 28 January 2003, 396 SCRA 506, 514-515; *Amployo v. People*, supra.

[15] *Amployo v. People*, supra.

[16] 357 Phil. 987, 998 (1998).

[17] Supra.

[18] *People v. Larin*, supra at 998-999.

[19] 332 Phil. 435 (1996).

- [20] Section 1(b), Rule 115, The Revised Rules of Criminal Procedure.
- [21] Section 6, Rule 110, *id.*
- [22] Section 8, *id.*
- [23] Section 9, *id.*
- [24] Rollo, pp. 9-10.
- [25] *People v. Rosare*, *supra* at 442-443.
- [26] 357 Phil. 940 (1998).
- [27] *Id.* at 949.
- [28] G.R. Nos. 148689-92, 30 March 2004, 426 SCRA 502.
- [29] *Id.* at 510-511.
- [30] 390 Phil. 449 (2000).
- [31] G.R. No. 143084, 1 April 2003, 400 SCRA 243.
- [32] Original Records, p. 6.
- [33] *Id.* at 60.
- [34] *Reyes v. Camilon*, G.R. No. 46198, 20 December 1990, 192 SCRA 445, 453.
- [35] TSN, 20 October 1997, pp. 6-7.
- [36] *People v. Gecomio*, 324 Phil. 297 (1996).
- [37] *People v. Zamora*, 343 Phil. 574, 590 (1997).
- [38] *People v. Dadles*, 343 Phil. 916, 929 (1997).
- [39] *Supra*.

DISSENTING OPINION

Carpio, J.:

I dissent from the majority opinion.

I vote to declare petitioner Isidro Olivarez ("Olivarez") guilty of acts of lasciviousness under Article 336 of the Revised Penal Code ("RPC"), and not of acts of lasciviousness under Section 5 of Republic Act No. 7610 ("RA 7610").^[1] The penalty under Article 336 of the RPC is prision correccional, while the penalty under Section 5 of RA 7610 is reclusion temporal in its medium period to reclusion perpetua.

I anchor my dissent on two grounds. First, the Information only charged Olivarez with acts of lasciviousness under Article 336 of the RPC and not with acts of lasciviousness under Section 5 of RA 7610. Second, the prosecution proved that Olivarez committed acts of lasciviousness under Article 336 of the RPC and not acts of lasciviousness under Section 5 of RA 7610.

Article 336 of the RPC provides as follows:

Art. 336. Acts of lasciviousness. — Any person who shall commit any act of lasciviousness upon other persons of either sex, under any of the circumstances mentioned in the preceding article, shall be punished by prision correccional.

The essential elements of acts of lasciviousness under Article 336 of the RPC are as follows:

- That the offender commits any act of lasciviousness or lewdness;
- That the act of lasciviousness is committed against a person of either sex;
- That it is done under any of the following circumstances:
 - By using force or intimidation; or
 - When the offended party is deprived of reason or otherwise unconscious; [or]
 - By means of fraudulent machination or grave abuse of authority; or
 - When the offended party is under 12 years of age or is demented.[2] (Emphasis supplied)

On the other hand, Section 5 of RA 7610 provides as follows:

SEC. 5. Child Prostitution and Other Sexual Abuse. — Children, whether male or female, who for money, profit, or any other consideration or due to the coercion or influence of any adult, syndicate or group, indulge in sexual intercourse or lascivious conduct, are deemed to be children exploited in prostitution and other sexual abuse.

The penalty of reclusion temporal in its medium period to reclusion perpetua shall be imposed upon the following:

(a) Those who engage in or promote, facilitate or induce child prostitution which include, but are not limited to, the following:

- (1) Acting as a procurer of a child prostitute;
- (2) Inducing a person to be a client of a child prostitute by means of written or oral advertisements or other similar means;
- (3) Taking advantage of influence or relationship to procure a child as prostitute;
- (4) Threatening or using violence towards a child to engage him as a prostitute; or
- (5) Giving monetary consideration, goods or other pecuniary benefit to a child with the intent to engage such child in prostitution.

(b) Those who commit the act of sexual intercourse or lascivious conduct with a child exploited in prostitution or subject to other sexual abuse: Provided, That when the victims is under twelve (12) years of age, the perpetrators shall be prosecuted under Article 335, paragraph 3, for rape and Article 336 of Act No. 3815, as amended, the Revised Penal Code, for rape or lascivious conduct, as the case may be: Provided, That the penalty for lascivious conduct when the victim is under twelve (12) years of age shall be reclusion temporal in its medium period; and

(c) Those who derive profit or advantage therefrom, whether as manager or owner of the establishment where the prostitution takes place, or of the sauna, disco, bar, resort, place of entertainment or establishment serving as a cover or which engages in prostitution in addition to the activity for which the license has been issued to said establishment. (Emphasis supplied)

The majority opinion correctly enumerates the essential elements of the crime of acts of lasciviousness under Section 5 of RA 7610. The majority opinion states:

The elements of sexual abuse under Section 5, Article III of R.A. 7610 are as follows:

- The accused commits the acts of sexual intercourse or lascivious conduct.
- The said act is performed with a child exploited in prostitution or subjected to other sexual abuse.
- The child, whether male or female, is below 18 years of age.[3] (Emphasis supplied)

The majority opinion correctly distinguishes the first element from the second element. The first element refers to the acts of lasciviousness that the accused performs on the child. The second element refers to the special circumstance that the "child (is) exploited in prostitution or subjected to other sexual abuse." This special circumstance already exists when the accused performs acts of lasciviousness on the child. In short, the acts of lasciviousness that the accused performs on the child are separate and different from the child's exploitation in prostitution or subjection to "other sexual abuse."

Under Article 336 of the RPC, the accused performs the acts of lasciviousness on a child who is neither exploited in prostitution nor subjected to "other sexual abuse." In contrast, under Section 5 of RA 7610, the accused performs the acts of lasciviousness on a child who is either exploited in prostitution or subjected to "other sexual abuse."

Section 5 of RA 7610 deals with a situation where the acts of lasciviousness are committed on a child already either exploited in prostitution or subjected to "other sexual abuse." Clearly, the acts of lasciviousness committed on the child are separate and distinct from the other circumstance — that the child is either exploited in prostitution or subjected to "other sexual abuse."

The phrase "other sexual abuse" refers to any sexual abuse other than the acts of lasciviousness complained of and other than exploitation in prostitution. Such "other sexual abuse" could fall under acts encompassing "[O]bscene publications and indecent shows" mentioned in Section 3(d)(3) of RA 7610.[4]

Thus, a child performing in indecent shows in a cabaret is a child subjected to "other sexual abuse." A customer in such cabaret who commits acts of lasciviousness on the child is liable for violation of Section 5 of RA 7610. Also, a photographer who commits acts of lasciviousness on a child he is shooting for an obscene publication is liable for violation of Section 5 of RA 7610. The penalty for such acts of lasciviousness is more severe than if the acts are committed without the special circumstances of the child's subjection to "other sexual abuse."

Section 5 of RA 7610 penalizes those "who commit the act of sexual intercourse or lascivious conduct with a child exploited in prostitution or subjected to other sexual abuse." The act of sexual intercourse or lascivious conduct may be committed on a child already exploited in prostitution, whether the child engages in prostitution for profit or someone coerces her into prostitution against her will. The element of profit or coercion refers to the practice of prostitution, not to the sexual intercourse or lascivious conduct committed by the accused. A person may commit acts of lasciviousness even on a prostitute, as when a person massages the private parts of a prostitute against her will.

The sexual intercourse or act of lasciviousness may be committed on a child already subjected to other sexual abuse. The child may be subjected to such other sexual abuse for profit or through coercion, as when the child is employed or coerced into pornography. A complete stranger, through force or intimidation, may commit acts of lasciviousness on such child in violation of Section 5 of RA 7610.

The phrase "other sexual abuse" plainly means that the child is already subjected to sexual abuse other than the crime for which the accused is charged under Section 5 of RA 7610. The "other sexual abuse" is an element separate and distinct from the acts of lasciviousness that the accused performs on the child. The majority opinion

admits this when it enumerates the second element of the crime under Section 5 of RA 7610 — that the lascivious "act is performed with a child x x x subjected to other sexual abuse."

The Information filed against Olivarez for violation of RA 7610 states as follows:

The undersigned 4[th] Assistant Provincial Prosecution (sic) of Laguna upon a sworn complaint filed by the private complainant, CRISTINA B. ELITIONG, hereby accuses ISIDRO OLIVAREZ of the crime of "VIOLATION OF RA 7610", committed as follows:

That on or about July 20, 1997, in the Municipality of San Pedro, Province of Laguna, within the jurisdiction of this Honorable Court, said accused actuated by lewd design did then and there wilfully, unlawfully and feloniously by means of force and intimidation commit acts of lasciviousness on the person of one CRISTINA B. ELITIONG, by touching her breasts and kissing her lips, against her will, to her damage and prejudice.

CONTRARY TO LAW.

There is nothing in the Information that alleges that the child Cristina B. Elitiong ("Cristina") was exploited in prostitution or subjected to "other sexual abuse" when the accused performed the acts of lasciviousness on her.

Even the Complaint signed by Cristina does not state that she was a child exploited in prostitution or subjected to "other sexual abuse." The Complaint alleges as follows:

COMPLAINT

The undersigned complainant, accuses ISIDRO OLIVAREZ, of the crime of VIOLATION OF RA 7610, committed as follows:

That on or about 11:30 A.M. of July 20, 1997 at Brgy. San Vicente, San Pedro, Laguna, Philippines and within the jurisdiction of this Honorable Court the said accused with lewd design did then and there wilfully, unlawfully and feloniously commit an act of lasciviousness against one CRISTINA ELITIONG Y BALDONO, 16 years old, by kissing and touching her private parts and embracing her against her will.

CONTRARY TO LAW.

Even assuming that the Complaint can cure the defects in the Information, the Complaint does not state that Cristina is a child subjected to "other sexual abuse."

In short, the Information does not specifically allege the second essential element of the crime of acts of lasciviousness under Section 5 of RA 7610. The majority opinion states that the second element of the crime is that "[T]he said act is performed with a child exploited in prostitution or subjected to other sexual abuse." This special circumstance, warranting the imposition of a much heavier penalty for acts of lasciviousness, is not alleged either in the Information or in the Complaint.

The fundamental rule is that the Information must allege all the elements of the crime. Sections 6[5] and 9,[6] Rule 110 of the Rules of Court mandate that the Information must allege all essential elements of the crime. Section 6 of Rule 110 provides that the "information is sufficient if it states x x x the acts or omissions complained of as constituting the offense." Section 9 of Rule 110 further provides that the "acts or omissions complained of as constituting the offense x x x must be stated in ordinary and concise language."

Thus, in *Balitaan v. Court of First Instance of Batangas*,[7] the Court held:

It is fundamental that every element of which the offense is composed must be alleged in the complaint or information. What facts and circumstances are necessary to be stated must be determined by reference to the definitions and the essentials of the specific crimes.

x x x

The main purpose of requiring the various elements of a crime to be set out in an information is to enable the accused to suitably prepare his defense. He is presumed to have no independent knowledge of the facts that constitute the offense. (Emphasis supplied)

The Court has reiterated this ruling in subsequent cases.[8]

In the present case, since the Information failed to allege the second essential element of the crime as defined in Section 5 of RA 7610, Olivarez cannot be convicted for violation of RA 7610. The Information is void to charge Olivarez for violation of Section 5 of RA 7610. Otherwise, Olivarez's would be deprived of his constitutional right to be informed of the charge against him.

However, the Information is sufficient to charge Olivarez for violation of Article 336 of the RPC. The special circumstance that the child is "subjected to other sexual abuse" is not an element in the crime of acts of lasciviousness under Article 336 of the RPC. Thus, the Information remains valid to charge Olivarez with acts of lasciviousness, not under Section 5 of RA 7610, but under Article 336 of the RPC.

During trial, the prosecution proved that Olivarez used force on Cristina when Olivarez "pulled her to the kitchen and, closing the kitchen door, kissed her on the lips." [9] Olivarez also "embraced (Cristina) and held her breast." [10] Clearly, Olivarez committed acts of lasciviousness using force on the complainant. This is sufficient to convict Olivarez for violation of Article 336 of the RPC.

The records, however, are bereft of any shred of evidence showing that Cristina was "subjected to other sexual abuse" when Olivarez committed the acts of lasciviousness on her. Olivarez employed Cristina, with her two brothers, to stitch sampaguita flowers. This was gainful and decent employment.

If a child works as a nude model for an obscene magazine, then any act of lasciviousness committed on such a child would warrant imposition of the heavier penalty under Section 5 of RA 7610. However, the Information must allege the special circumstance that the child is "subjected to other sexual abuse," which circumstance the prosecution must prove during trial.

In the present case, the special circumstance that the complainant was "subjected to other sexual abuse" was neither alleged in the Information nor proved during the trial.

Accordingly, I vote to convict Olivarez for violation of Article 336 of the RPC and to impose on him the penalty of prision correccional in its medium period, there being no aggravating or mitigating circumstances.

[1] Special Protection of Children Against Child Abuse, Exploitation and Discrimination Act.

[2] Luis B. Reyes, Revised Penal Code, Book Two, p. 862 (2001).

[3] Majority Opinion, p. 5.

[4] Section 3 of RA 7610 provides as follows: "SEC. 3. Definition of Terms. —

(a) "Children" refers to person below eighteen (18) years of age or those over but are unable to fully take care of themselves or protect themselves from abuse, neglect, cruelty, exploitation or discrimination because of a physical or mental disability or condition;

(b) "Child abuse" refers to the maltreatment, whether habitual or not, of the child which includes any of the following:

- (1) Psychological and physical abuse, neglect, cruelty, sexual abuse and emotional maltreatment;
- (2) Any act by deeds or words which debases, degrades or demeans the intrinsic worth and dignity of a child as a human being;
- (3) Unreasonable deprivation of his basic needs for survival, such as food and shelter; or
- (4) Failure to immediately give medical treatment to an injured child resulting in serious impairment of his growth and development or in his permanent incapacity or death.

(c) "Circumstances which gravely threaten or endanger the survival and normal development of children" include, but are not limited to, the following;

- (1) Being in a community where there is armed conflict or being affected by armed conflict-related activities;
- (2) Working under conditions hazardous to life, safety and morals which unduly interfere with their normal development;
- (3) Living in or fending for themselves in the streets of urban or rural areas without the care of parents or a guardian or any adult supervision needed for their welfare;
- (4) Being a member of a indigenous cultural community and/or living under conditions of extreme poverty or in an area which is underdeveloped and/or lacks or has inadequate access to basic services needed for a good quality of life;
- (5) Being a victim of a man-made or natural disaster or calamity; or
- (6) Circumstances analogous to those abovestated which endanger the life, safety or normal development of children.

(d) "Comprehensive program against child abuse, exploitation and discrimination" refers to the coordinated program of services and facilities to protect children against:

- (1) Child Prostitution and other sexual abuse;
- (2) Child trafficking;
- (3) Obscene publications and indecent shows;
- (4) Other acts of abuses; and
- (5) Circumstances which threaten or endanger the survival and normal development of children. (Emphasis supplied)

[5]Section 6 of Rule 110 provides as follows: "Sufficiency of complaint or information. — A complaint or information is sufficient if it states the name of the accused; the designation of the offense by the statute; the acts or omissions complained of as constituting the offense; the name of the offended party; the approximate time of the commission of the offense, and the place wherein the offense was committed

When an offense is committed by more than one person, all of them shall be included in the complaint or information."

[6] Section 9 of Rule 110 provides as follows: "Cause of accusation. — The acts or omissions complained of as constituting the offense must be stated in ordinary and concise language without repetition, not necessarily in the terms of the statute defining the offense, but in such form as is sufficient to enable a person of common understanding to know what offense is intended to be charged and enable the court to pronounce proper judgment."

[7] 201 Phil. 311 (1982). Reported as *Balitaan v. CFI of Batangas, Branch II, et al.*

[8]*Garcia v. People*, G.R. No. 144785, 11 September 2003, 410 SCRA 582; *People v. Bernas*, 427 Phil. 649

(2002); *Bautista v. Court of Appeals*, 413 Phil. 159 (2001); *People v. Larena*, 368 Phil. 614 (1999); *People v. Ramos*, 357 Phil. 559 (1998).

[9]Rollo, p. 11.

[10]Ibid.

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